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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 30.

KEITH MARTIN,
Appellant,

vs.

HERBERT WALTON AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS,
Appellee.

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF APPELLANT.

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AN APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF APPELLANT.

OPINION BELOW.

The opinion of the Supreme Court of Kansas (R. 17) is reported at 187 Kan. 473, 357 P.2d 782. The order of the Kansas district court dismissing the appellant's alternative writ of mandamus (R. 13) is unreported.

JURISDICTION.

The judgment of the court below was entered on December 10, 1960 (R. 19). Notice of appeal to the Supreme Court of the United States was filed with the Kansas Supreme Court on December 31, 1960 (R. 33). Probable jurisdiction was noted on March 27, 1961 (R. 34). The motion to substitute Herbert Walton in the place of Joseph S. Davis as the party appellee was sustained by this Court on May 8, 1961 (R. 35).

The jurisdiction of this Court rests on 28 U.S.C. 1257 (2). There was drawn in question the validity of Kan. G.S. 1949, 7-104 and amended Rules 41 and 54 of the Supreme Court of Kansas on the ground of their being repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. The decision of the Supreme Court of Kansas was in favor of their validity. For the purpose of conferring appellate jurisdiction on the Supreme Court of the United States, amended Rules 41 and 54 are to be treated as statutory within the meaning of 28 U.S.C. 1257 (2). *Hamilton* v. *Regents*, 293 U.S. 245; *Lathrop* v. *Donohue*, ___ U.S. ___,

QUESTION PRESENTED.

Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States, may an attorney who has been regularly admitted to practice law in the state of his residence and who has maintained an office and active practice in that state since the date of his admission, be denied, by subsequently promulgated court rules, the right to appear as counsel in the courts or before boards and commissions

of that state unless he associates and has appearing with him "local counsel," as if he were a non-resident, unlicensed attorney, for the sole reason that, in addition to his practice and office in the state of his residence, he also maintains an office and practice in an adjoining state?

STATUTES INVOLVED.

The relevant provisions of the 1949 Kansas General Statutes and the Kansas Supreme Court Rules, as amended December 15, 1958, are as follows:

> Kan. G.S., 1949, 7-104. *Attorneys from other states.* Any regularly admitted practicing attorney in the courts of record of another state or territory, having professional business in the courts or before any board, department, commission or other administrative tribunal or agency, of this state, may, on motion be admitted to practice for the purpose of said business only, in any of said courts, tribunals or agencies, upon taking the oath as aforesaid and upon it being made to appear by a written showing filed therein, that he has associated and personally appearing with him in the action, hearing or proceeding an attorney who is a resident of and duly and regularly admitted to practice in the courts of record of this state, upon whom service may be had in all matters connected with said action, hearing or proceeding, with the same effect as if personally made on such foreign attorney, within this state, and such foreign attorney shall thereupon be and become subject to the order of, and amenable to disciplinary action by the courts, agencies or tribunals of this state: *Provided,* That in all actions before a court of record, said associate attorney shall be a resident of and maintain his law office within the judicial district in which said action is filed or pending. No such court, agency or tribunal shall entertain any action, matter, hearing or proceeding while the same is begun, carried on or maintained in violation

of the provisions of this section: *Provided*, Nothing in this section shall be construed to prohibit any party from appearing before any of said courts, tribunals or agencies, in his own proper person and on his own behalf.

Rule No. 41. *Admission to Practice.* As soon as practicable after the completion of an examination, the board shall file a report with the clerk of the court recommending the granting or the denial of the petition of the applicant. Whenever such report shall recommend the granting of a petition, unless some reason shall appear to the contrary, the court will make an order admitting the applicant to practice in all the courts of the state, which order shall become effective upon his taking an oath in open court, the form of which shall be in substance as follows:

> You do solemnly swear that you will support and bear true allegiance to the constitution of the United States and the constitution of the State of Kansas; that you will neither delay nor deny any man his right through malice, for lucre, or from any unworthy desire; that you will not knowingly foster or promote, or give your assent to any fraudulent, groundless or unjust suit; that you will neither do, nor consent to the doing of any falsehood in court; and that you will discharge your duties as an attorney and counselor of the supreme court and all inferior courts of the state of Kansas with fidelity both to the court and to your cause, and to the best of your knowledge and ability. So help you God.

Upon the making of such order the clerk shall issue to such applicant a certificate of his authority to practice law in this and all inferior courts of the state, upon his signing his name on the roll of attorneys of this court. Whenever the board shall recommend a denial of the petition, an order will be made to that effect.

> *Provided further however, The authority granted to practice law shall not be exercised except as provided under Rule No. 54 infra, when the licensee herein has been admitted to the Bar of another state or territory and is regularly engaged in the practice of law in such other state or territory.* (Emphasis added.) 186 Kan. xvii

(The foregoing italicized paragraph was added by amendment on December 15, 1958.)

> Rule No. 54. An attorney regularly practicing outside of this state and in good standing as a member of the bar of the place of his regular practice may be recognized as an attorney by the courts, commissions, and agencies of this state, for any action or proceeding, but only if he has associated with him as attorney of record in such action or proceeding a member of the Bar of this state qualified under the provisions of G.S. 1949, 7-104, upon whom service may be had in all matters connected with such action or proceeding proper to be served upon an attorney of record. 186 Kan. xix

(Prior to its amendment on December 15, 1958, Rule 54 referred to an attorney "*residing* outside of this state in good standing as an attorney at the place of his *residence*," rather than the above. (Emphasis added.))

STATEMENT.

This matter has previously been before this Court in another context, *Taylor* v. *Taylor*, No. 552, 1959 Term, appeal dismissed, 361 U.S. 374. As background for the instant proceeding, the *Taylor* case is briefly reviewed:

On March 10, 1959, a petition for divorce was filed in the Wyandotte County District Court of Kansas by Keith Martin, a member of the Kansas Bar and appellant in the

instant case, as attorney for Margaret Taylor. The defendant in that suit moved to strike the petition on the ground that Martin was a member in good standing of the Missouri Bar and regularly practiced in Missouri, and that he therefore had no authority to file such petition without the association of an attorney of record who was a member of the bar of the State of Kansas as required by amended Rules 41 and 54 of the Kansas Supreme Court. Upon Martin's failure to comply with the trial court's order that he obtain local counsel, Mrs. Taylor's petition was dismissed. Mrs. Taylor appealed to the Kansas Supreme Court contending, *inter alia*, that the application of amended Rules 41 and 54 to her attorney deprived him of due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution. The Kansas Supreme Court sustained the constitutionality of amended Rules 41 and 54 as applied to Martin, and affirmed the order of the trial court. *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190. On further appeal to this Court, the appeal was dismissed. No. 552, 1959 Term, 361 U.S. 374.

Believing that this Court may have dismissed the *Taylor* appeal because of the rule of *Tileston* v. *Ullman*, 318 U.S. 44, or because of possibilities of mootness, Martin returned to the Kansas courts. On February 29, 1960, appellant Martin filed a petition for a writ of mandamus in the Johnson County District Court of Kansas praying that the appellee judge of the Probate Court of Johnson County, Kansas, be compelled to allow appellant to file cases in that court and to appear and try such cases without the appearance or association of local counsel and without regard to amended Rules 41 and 54 of the Supreme Court of Kansas or to Kan. G.S. 1949, 7-104, and in accordance with the license granted to him by the Kansas Su-

preme Court (R. 2-6). The petition further prayed that amended Rules 41 and 54 and G.S. 1949, 7-104, be declared to be in violation of the Fourteenth Amendment of the United States Constitution as applied to appellant. (R. 2, 6.)

Appellant's petition alleged that he had been regularly admitted to practice in the State of Kansas on February 12, 1948, and that from that date to December 15, 1958, he had regularly appeared for clients in the Probate Court of Johnson County, Kansas, without association of "local counsel." Appellant also alleged that subsequent to the promulgation of amended Rules 41 and 54 on December 15, 1958 and the decision of *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190 (1959), discussed above, appellee judge had not allowed appellant to appear in said court without the association of "local counsel," and had informed appellant that in the future he could not appear in defendant's court for clients without the appearance and association of "local counsel." (R. 2, 4.)

After the district court issued an alternative writ directing appellee judge to permit appellant to appear without the association of another Kansas lawyer or to show cause to the contrary (R. 8), appellee filed a motion to quash the writ for the reason that neither the petition nor the writ itself stated a cause of action (R. 9). In its opinion after oral argument, the district court declared that appellant's membership in the Missouri Bar and his regular practice in that state placed him squarely within the purview of amended Rules 41 and 54 requiring joinder of local counsel. The district court found that the facts relative to appellant were substantially the same as in *Taylor* v. *Taylor*, *supra*, and that that decision was determinative of the legal issues involved, including the constitutional questions (R. 11-13). Appellant's alternative writ was therefore dismissed and appellant appealed (R. 13).

According to the undisputed allegations of his petition, appellant was admitted to practice before the Kansas Supreme Court and all inferior courts on February 12, 1948, and is a duly licensed lawyer of the State of Kansas; he resides at 6200 West 61st Street in the City of Mission, Johnson County, Kansas (a community just across the state line from Kansas City, Missouri). Prior to his admission he attended the public schools of Miami County, Kansas, and received his A.B. (1942) and LL.B. (1947) degrees from the University of Kansas, and was elected to Phi Beta Kappa and Order of the Coif. He graduated from the Harvard Business School in September, 1946, with an M.B.A. degree. In 1943-45 he resided in Kansas City, Missouri, and was employed by the Pratt & Whitney Aircraft Corporation and attended night law school at the University of Kansas City. While attending Kansas University Law School in 1945-46 and 1946-47, he taught economics at Kansas University. (R. 2.)

Appellant has engaged in general practice in Kansas since April, 1948, and since that date has continuously maintained an office in Mission, Kansas. He has been City Attorney of Mission, Kansas, since 1951 and is a member of the State Board of Tax Appeals of Kansas. He has represented the State of Kansas in highway litigation in the Kansas courts. He wrote an article on Kansas procedure in the Third Survey of Kansas Law, 6 Kan. L. Rev. 134 (1957). He has argued cases in the Supreme Court of Kansas.[1] He is a member of state and local bar associations of Kansas. (R. 2-3.)

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1. *State* v. *Sharp*, 174 Kan. 672, 258 P.2d 306; *State* v. *Fletcher*, 174 Kan. 530, 256 P.2d 847; *Rhea* v. *Kansas City Power & Light Co.*, 176 Kan. 674, 272 P.2d 741; *Lindbloom* v. *Lindbloom*, 177 Kan. 286, 279 P.2d 243; *State Highway Commission* v. *Abercrombie*, 185 Kan. 47, 340 P.2d 377.

Appellant was duly licensed to practice law in Missouri on August 2, 1947, and has since engaged in general practice in Missouri in addition to his Kansas practice which commenced in April, 1948. He now maintains an office in the Bryant Building, Kansas City, Jackson County, Missouri. He is a member of state and local bar associations of Missouri. (R. 2-3.)

Appellant's petition further alleged that Johnson County, Kansas, and Jackson County, Missouri, in which he maintains his two offices, are contiguous counties; Wyandotte County, Kansas, is contiguous to each of the foregoing counties. The three counties are part of one metropolitan area and have a population of about one million. Appellant's clients frequently live in one county and either work or have business connections in another county and state. Their problems involve the laws and procedures of both states. Appellant's knowledge of the laws and procedures and his ability to practice in either state have been of assistance to him in obtaining clients and in being able to give them counsel and court representation. He consults with as many clients in his Kansas office or home as in his Missouri office, although most of his office work is performed in his Missouri office. (R. 2-3.)

Appellant's net income from his law practice exceeds $15,000 per year. Approximately one-half that sum has been earned from Kansas practice and has been so reported on his state income tax returns. A large proportion of his income is derived from court appearances including adoptions and the probate of estates of which the appellee's court has jurisdiction. Because he cannot represent clients in Kansas courts without the compulsory presence of another lawyer, clients have come to believe that he cannot counsel them regarding Kansas law or represent them in Kansas courts. He is therefore faced

with the loss of a substantial portion of his income. (R. 3-5.)

According to the minimum fee schedules of the Johnson and Wyandotte County bar associations in Kansas, local counsel require compensation of approximately one-third to one-half of the fee for serving as local counsel. Amended Rules 41 and 54 require appellant to share his income with local counsel who frequently are not acquainted with the case in issue but are nevertheless required to be in court by the defendant because of amended Rules 41 and 54. (R. 4.)

The Decision of the Court Below.

On appeal to the Supreme Court of Kansas, appellant urged that as applied to him amended Rules 41 and 54 and G.S. 1949, 7-104, were in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. The Kansas Supreme Court rejected appellant's contention. It justified Rules 41 and 54 as applied retroactively to appellant by taking *judicial notice* of the following: that there are six times as many lawyers practicing on the Missouri side as on the Kansas side of the Kansas City metropolitan area but that the bulk of industrial litigation occurs in Kansas courts; that difficulty has been experienced in serving process on, and securing the presence in court of, Missouri-officed Kansas attorneys.[2] The court also found justification in the need for specialization. In regard to the constitutional issues the Kansas Court said:

> "We now turn to the principal question, whether Rules 41 and 54 violate the due process and equal protection clauses of the Fourteenth Amendment to

2. As to the legitimacy of such judicial notice, see discussion *infra*, pp. 26-33.

the Constitution of the United States. The appellant contends that, as applied to him, they lack a rational connection between the grounds for 'suspension' of his license and qualifications *essential* to the practice of law, and, between the 'suspension' of his license and *any* objective the court might legitimately attain in the exercise of its power to maintain the standards of the Bar, and relies upon *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238, 1 L. Ed. 2d 796, 77 S. Ct. 752; *Knoigsberg* [*sic*] v. *State Bar*, 353 U.S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722 and *In re Patterson*, 353 U.S. 952, 1 L. Ed. 2d 906, 77 S. Ct. 869. We are cognizant of what was said and held in those cases, but they do not control the question presented. (R. 26.)

* * *

"In carrying out its duty of supervising the actions of its officers, the supreme court cannot always formulate rules without the possibility, regrettably, that some one of them may work a hardship on some member or group of members of the Bar. The appellant alleges such a hardship, but, as we have seen, the rules in question were directed to serve the public policy of the state in all phases of actions, hearings and proceedings where the applicant or litigant is represented by a Kansas licensed attorney who is regularly engaged in the practice of law in another state. While the police power is generally considered an exclusive power of the legislature, it may, for reasons not necessary to detail here, be exercised by the courts (*Workmen's Compensation Board* v. *Abbott*, 212 Ky. 123, 278 S.W. 533, 47 A.L.R. 789; *Petition of Florida State Bar Ass'n*, 40 So.2d 902). (R. 29.)

"It is within the permissible function of the state through the supreme court to classify members of the Bar when a real, logical and substantial basis exists for the classification. The equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority. That clause is not offended against simply because as the result of the exercise

of the power to classify some inequality may be occasioned (*Louisville & Nashville R. R. v. Melton*, 218 U.S. 36, 54 L. Ed. 921, 30 S. Ct. 676). * * * (R. 29).

"The same is true of the due process clause. The enjoyment of property is subject to the exercise by the state of the police power, and the question whether what has been done amounts to a taking of property is whether such taking was pursuant to a valid exercise of that power (12 Am. Jur., Constitutional Law, Par. 652, p. 344), or, as in the instant case, the valid exercise of inherent power of the supreme court to regulate, supervise and control the practice of law before the courts of the state, which is the equivalent of the police power. Regulations are not unconstitutional merely because they operate as a restraint upon private rights of persons or property, or will result in a loss to individuals. * * * (R. 30).

* * *

"* * * This opinion is concluded with the observation there is no substantial and fair ground to say that the rules in question make an unreasonable and unfounded classification thereby denying to the appellant due process of law or the equal protection of the law." (R. 32)

SUMMARY OF ARGUMENT.

The broad question before the Court is the freedom of the legal profession from unreasonable restrictions. Appellant was admitted to practice in Missouri in 1947 and to practice in Kansas in 1948. Thereafter he practiced in both states. By the amendment of its Rules 41 and 54 on December 15, 1958, and the decision below, the Kansas Supreme Court has determined that because he also practices in Missouri the appellant can no longer appear before Kansas courts without joinder of "local counsel." By vir-

tue of this ruling appellant has been effectively disbarred from practice in Kansas. The goodwill built up in a decade of practice has been destroyed and he has suffered a substantial loss of income.

The Kansas Supreme Court admittedly has the power to formulate rules for the furtherance of the administration of justice but that court cannot without violation of the Fourteenth Amendment enforce unreasonable rules so as to deprive a lawyer of his right to practice. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, affirmatively established that lawyers like all other persons are protected by the Fourteenth Amendment from arbitrary state action.

The Kansas court has acted arbitrarily and unreasonably. It admits that appellant is guilty of none of the misfeasance and malfeasance to which amended Rules 41 and 54 are purportedly directed. It attempts to hide the unreasonableness of the application of these Rules to appellant behind an ink screen of judicially noticed facts.

First, the Kansas court takes judicial notice that whereas the bulk of practicing attorneys in the Kansas City metropolitan area are officed in Missouri, the bulk of industrial litigation occurs in Kansas courts. The total lack of relevancy between this finding and appellant's (or any lawyer's) competence to appear in court is so patent as to manifest that the court's real concern is to improve the economic situation of Kansas lawyers who practice only in that state and not to improve the quality of justice administered in Kansas courts.

Second, the Kansas court purports to take judicial notice (without specifying when or where) that Kansas courts have experienced difficulty in getting service of papers and motions on Kansas licensed attorneys officed in Missouri. This has absolutely no applicability to ap-

pellant because he has both home and office in Kansas to which process can be mailed or served under the Kansas court's own rules for service of process. It is admitted that he has never failed to receive process and that no difficulty has been experienced in securing his presence in court. The Kansas court does not explain why its procedure for the service of notice works in the case of lawyers officed exclusively in Kansas, wherever this may be within the boundaries of the state, but does not work in the case of a lawyer officed in the same county as the court sending process if this lawyer happens also to have an office in another state a few miles from his Kansas office.

As a final ground, the Kansas court seeks to justify amended Rules 41 and 54 upon the finding that this is a day of specialization and that there is imperative need for specialists in Kansas law and procedure. The court chooses to ignore the fact that appellant and other lawyers in the same position as he have engaged extensively in the practice of law in Kansas courts. The court's reasoning rests upon the fallacy that a lawyer cannot be competent in Kansas procedure if he also practices in the courts of another jurisdiction.

Besides lacking justification as applied to appellant, the amended Rules are vague and uncertain. The Kansas court does not define what it means by "regularly engaged" in out-of-state practice. Apparently it intends an adjustable standard which can be fitted to the occasion. Such adjustability is incompatible with due process and rule of law. *Winters* v. *New York*, 333 U.S. 507.

Moreover, the amended Rules 41 and 54 deprive appellant of equal protection of the laws in violation of the Fourteenth Amendment. Appellant Martin and other Kansas attorneys similarly engaged in out-of-state practice,

who do not differ in any material respect from Kansas attorneys with practices limited to Kansas, are placed by the imposition of Rules 41 and 54 into the category of "foreign attorneys" with all of the disabilities attaching thereto. The Equal Protection Clause forbids different treatment of like classes. *Morey* v. *Doud*, 354 U.S. 457.

ARGUMENT.

I. Due Process.

The question before this Court relates in its narrow aspect to the arbitrary exclusion of an attorney from the full right to practice, but in its broader implications it touches upon the freedom of the legal profession from unreasonable restrictions--a freedom which this Court proclaimed in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, in dealing with those seeking admission to the profession. The Kansas Supreme Court paid deference to *Schware*, but the tenor of its opinion manifests a belief that a lawyer is completely subject to the dictates of the court. This philosophy is often summed up by saying that the practice of law is a privilege rather than a vested or natural right. For most of the courts which have made this assertion it has been a gratuity, an unnecessary appendage to a reasonable and conscionable denial of admission to practice or exclusion therefrom.[3] After all, ours is a govern-

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3. See *In re Isserman*, 345 U.S. 286 (disbarment for committing contempt of court in defending Communists); *Philbrook* v. *Newman*, 85 Fed. 139 (C.C. N.D. Cal.) (wrongful disbarment action wherein grounds for disbarment were found to exist); *Siegel* v. *Ragen*, 88 F. Supp. 996 (D.C. N.D. Ill.) (penitentiary inmate has no constitutional right to practice law by preparing habeas corpus petitions for other prisoners); *In re Greer*, 52 Ariz. 385, 81 P.2d 96 (disbarment for mismanagement of estate); *In re Harrison*, 231 Ind. 665, 109 N.E.2d 722 (disbarment after conviction of felony); *In re Meldrum*, 243 Iowa 777, 51 N.W.2d 881 (suspension of license for solicitation of business); *State* v. *Ros-*

ment of laws based upon natural principles of justice and equity. The statement that the practice of law is a privilege usually costs the maker nothing because it is rarely germane to the matter at hand. Yet confusion and injustice abound when the statement is so often repeated that a court comes to believe what is implied by it—that the lawyer's practice being a privilege, he has no rights against a court seeking to deprive him of his means of livelihood.

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borough, 152 La. 945, 94 So. 858 (conviction for unlawful practice of law); *Ayres* v. *Hadaway*, 303 Mich. 589, 6 N.W.2d 905) (lawyer on state bar inactive list has no right to engage in law practice); *State ex rel. Ralston* v. *Turner*, 141 Neb. 556, 4 N.W.2d 302 (requirement valid that bar applicant must have graduated from reputable law school or studied in law office); *Baker* v. *Varser*, 240 N.C. 260, 82 S.E.2d 90 (bar applicant failed to prove residence in state), *Ginsberg* v. *Kovrak*, 392 Pa. 143, 139 A.2d 889 (attorney admitted to federal court but not to state court in federal district enjoined from practicing law and maintaining office—right to practice in federal court not questioned); *In re Monaghan*, 167 A.2d 81 (Vt.) (refusal by bar examiners for adequate reasons to certify as to applicant's moral character and fitness); *State ex rel. Mackintosh* v. *Rossman*, 53 Wash. 1, 101 Pac. 357 (disbarment of generally dishonest attorney). And *cf. Starr* v. *State Board of Law Examiners*, 159 F.2d 305 (C.A. 7th Cir.) (damage suit for wrongful refusal to admit to bar); *Brents* v. *Stone*, 60 F. Supp. 82 (D.C. E.D. Ill.) (declaratory judgment proceeding to determine validity of Illinois Supreme Court rule relating to bar admission—allegation that bar examiners had failed applicants in order to secure additional fees in re-examination); *Petition of Florida State Bar Association*, 134 Fla. 851, 186 So. 280 (consideration of rules to regulate state bar); *Hulbert* v. *Mybeck*, 220 Ind. 530, 44 N.E.2d 830 (lawyers have no special interest entitling them to maintain action to enjoin illegal practices); *In re Casebier*, 129 Kan. 853, 284 Pac. 611 (statute valid requiring disbarment upon receipt of certified copy of judgment convicting attorney of felony or of misdemeanor involving moral turpitude); *Moity* v. *Louisiana State Bar Association*, 239 La. 1081, 121 So.2d 87 (bar applicant entitled to hearing on issue of his good moral character); *Petition for Integration of Bar of Minnesota*, 216 Minn. 195, 12 N.W.2d 515 (court has inherent power to promulgate order integrating state bar); *State ex rel. Rice* v. *Cozad*, 70 S.D. 193, 16 N.W.2d 484 (lawyers do not have property right so as to enjoin unauthorized practice); *Lamb* v. *Whitaker*, 171 Tenn. 485, 105 S.W.2d 105 (statute valid authorizing attorneys to bring suit to enjoin unlawful practice); *Ruckenbrod* v. *Mullins*, 102 Utah 548, 133 P.2d 325 (lawyer has duty to defend indigent persons); *Lathrop* v. *Donohue*, 10 Wis.2d 320, 102 N.W.2d 404 (order valid integrating state bar).

This notion has the capacity to destroy the independence of the legal profession and thus render the "profession largely incapable of performing the very kinds of services for the public that most justify its existence."[4] In a number of recent cases before this Court, lawyers or applicants for admission to practice law have claimed denial of constitutional rights, but in no case since the Civil War has this Court been confronted with an assertion of power over the legal profession analogous to that attempted by the Kansas court.

A. Appellant Is Deprived of Substantial Interests.

Appellant Keith Martin was admitted to practice in Kansas in 1948 by an order of the Supreme Court of Kansas. This order is for life or until disbarment for cause. His license gave him the right to appear in the Kansas Supreme Court and all inferior courts. Rule 41, *supra*, p. 4. No condition was attached to his license that he must not practice in another state. In *Dyche* v. *Crawford*, 183 Kan. 441, 327 P.2d 1047, decided in July, 1958, ten years after appellant's admission to practice in Kansas, the Kansas Supreme Court held that a resident lawyer who had been admitted to the Kansas Bar could not be deemed a "foreign attorney" within the meaning of Kan. G.S. 1949, 7-104 (*supra*, pp. 3-4) by reason of his having also been admitted to practice in another state.[5] Appellant practiced in Kansas and Mis-

4. Mr. Justice Black in *Cohen* v. *Hurley*, 366 U.S. 117, 135 (dissenting opinion).

5. The court said:

"It would seem clear that Section 7-104 has no application to lawyers who are admitted to the Bar of the state of Kansas."

* * *

souri for ten years. By the amendment of Rules 41 and 54 late in 1958 and the decision below, the Kansas Court has deemed that appellant must now be joined by "local counsel." This ruling has in effect suspended his Kansas license. Henceforth he is to be treated as a "foreign lawyer" who is presumed to be incompetent in Kansas law and procedure, and who is to be allowed to appear in Kansas courts only if his client's interests are "safeguarded" by the presence of "local counsel." Appellant's status before the Kansas courts is therefore the same as a non-resident attorney who has not been admitted to the Kansas Bar. He is thus threatened with the loss of a practice built up through ten years of effort, and with the destruction of a part of his income."

"Certain additional qualifying words have been added to the statute in ninety years and certain additional safeguards have been added, but it remains clear that the subjects of the section are attorneys at law admitted to practice in other states but not admitted to practice in Kansas." 183 Kan. at 443-44, 327 P.2d at 1049.

At the time of the *Dyche* case, Rule 41 did not have the final proviso that the present Rule does (*supra*, p. 5), and Rule 54 was applicable exclusively to "An attorney *residing* outside of this state" rather than—as it is now—"An attorney regularly *practicing* outside of this state" (*supra*, p. 5).

After the *Dyche* decision, the Rules were amended to their present form. The Kansas Supreme Court admits in its opinion below that the "practical effect [of the amended Rules] was to extend the statute's coverage to include those members of the Kansas Bar who regularly engage in the practice of law in another state" (R. 26).

6. Kansas formerly had a liberal policy of admitting attorneys of other jurisdictions to practice in its courts. Until 1935 foreign attorneys could practice in Kansas courts without joinder of local counsel. Gen. Stat. 1868, Ch. 11, sec. 4, provided that "any practicing attorney of any State or territory, having professional business in either the supreme or district court, may, on motion, be admitted to practice in either of these courts * * *." With Laws 1935, ch. 69 (G.S. 1935, 7-104), this long standing policy of liberality was abandoned. The core of present section 7-104 was contained in that statute. "Any regularly admitted practicing attorney in the courts of record of another state or territory, and not residing in the state of Kansas, having professional business

Appellant does not protest an insignificant and chimerical loss of liberty.[7] He has suffered an immediate, direct and drastic injury. A lawyer engages in practice, to be sure, to serve the public, but he does not do so without expectation of compensation. The income which a lawyer receives from his practice provides the means by which he and his family live. It is not a gift conferred by the state from on high but rather a return on the substantial investment in time, money and energy which he has made in preparing himself for his profession. The Kansas Court disclaims that it denies appellant the

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in the courts of this state" could on motion be admitted to practice "for the purpose of said business only" upon it being made to appear that *he or she was associated with a Kansas attorney residing in the judicial district in which the action was pending.* This statute, however, had a qualifying proviso "that regularly licensed practicing attorneys of other states, the laws of which states permit the practice in its courts of attorneys from this state, without a local attorney being associated with such attorney, shall not be required to comply with the provisions of this act." This reciprocal proviso was repealed by Laws 1939, ch. 83. Its short life was no doubt due to the fact that few foreign lawyers were made to join with Kansas local counsel because the neighboring states of Colorado, Nebraska, Missouri, Arkansas and Oklahoma, from which the bulk of out-of-state lawyers having Kansas business comes, either did not have a local counsel requirement or had some form of reciprocal provision. The present form of section 7-104 was enacted by Laws 1947, ch. 94 (G.S., 1947 Supp.). It contains, of course, no reciprocity provision.

Rule 54, which was adopted July 3, 1936, implemented the restrictive policy introduced by Laws 1935, ch. 69. The amendment of Rule 54 in 1958 so as to make it applicable to all lawyers *practicing* outside the state extended and perverted the policy of section 7-104.

7. The recent integrated Wisconsin Bar case, *Lathrop* v. *Donohue*, U.S. , differs materially from this case. The only interference with his liberty which Lathrop effectively substantiated was the exaction of annual dues of $15 to the State Bar. Lathrop contended that his constitutional rights of free speech would be infringed if his dues money were used to support the political activities of the State Bar, but the Court did not pass on this issue because he failed to show that the State Bar had utilized funds for specific purposes to which he was opposed.

right to practice before Kansas tribunals (R. 26),[8] which abstractly is true yet in substance false because the court's Rules as applied to him deprive him of the economic incentive which gives meaning to an individual's practicing law. Appellant cannot afford to engage in a practice from which someone else is entitled to a large portion of the emoluments for the sole reason of his compulsory presence.[9]

To say that appellant has been disbarred in Kansas may seem an overstatement, but when words are stripped of their husks and the real import of amended Rules 41 and 54 is laid bare, there is little to distinguish the action of the Kansas court from one of disbarment. In effect, appellant has been declared incompetent to appear alone in a Kansas court because of misconduct—the malfeasance being that he maintains an office and practice in another state besides Kansas. The good-will he has built up in his

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8. In *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190 (*supra*, pp. 5-6), the court pretended that amended Rules 41 and 54 had not brought about the consequences of which Martin complained. "Martin has not been singled out or made an example of and he has not been deprived of any right to practice law before the courts of this state but rather, by his own choice, he has brought himself within the amended portion of rule 41 which merely requires compliance with G.S. 1949, 7-104." 185 Kan. at 328; 342 P.2d at 193. In short, the court said that Martin had only to surrender his constitutional rights in order to be restored to good standing in Kansas!

9. According to the minimum fee schedules of the Johnson and Wyandotte County, Kansas, Bar Associations, local counsel require compensation of approximately one-third to one-half of the fee for their services (R. 4). To be sure, appellant could avoid having to associate with "local counsel" if he confined himself strictly to a Kansas office practice, but it is fanciful to imagine that he could do so. Even if prospective clients were not deterred from coming to him by the implications of incompetency in Kansas law, few clients would be interested in seeking the services of a lawyer who has only limited capacity to represent them in court. Appellant obviously cannot try contested court or jury cases when fees are small if he has to pay another lawyer to sit in court all day with him.

Kansas practice has been destroyed. No client will seek or retain him as counsel in a Kansas court any more. The public does not understand the subtleties of Rules 41 and 54. It believes that appellant is a blemished lawyer and that he no longer can fully and adequately appear in Kansas courts.

B. The Kansas Court's Rules Are Subject to Due Process.

The power of the Kansas Supreme Court to formulate rules in the furtherance of the administration of justice is admitted, but such power has a built-in limit consistent with reasonable and rational application. State courts are not less forbidden by the Fourteenth Amendment to deprive persons of their substantive rights than are state legislatures. *American Federation of Labor* v. *Swing*, 312 U.S. 321; *Shelly* v. *Kramer*, 334 U.S. 1. The Fourteenth Amendment forbids the states to deprive *any person* of life, liberty or property without due process of law or deny him equal protection of the laws. A person is afforded protection without regard to his status or office. See *Truax* v. *Raich*, 239 U.S. 33; *Hines* v. *Davidowitz*, 312 U.S. 52; *Skinner* v. *Oklahoma*, 316 U.S. 535. Because a lawyer is an officer of the court he is not any less a "person." His status as an officer of the court binds him to a high standard of conduct, but it does not obligate him to surrender to the court rights which are constitutionally secured to every other person. It is immaterial that a lawyer does not have a "property interest" in his practice in the ordinary sense. The Fourteenth Amendment protects interests which are not strictly proprietary. *Thornhill* v. *Alabama*, 310 U.S. 88; *Staub* v. *City of Baxley*, 355 U.S. 313; *Meyer* v. *Nebraska*, 262 U.S. 390. The word "property" in the Amendment includes one's interest in one's profession and business as well as one's interest in one's chattels and realty. The "liberty" secured by the Fourteenth Amendment is

an assurance that one shall be protected in the right to use his powers of mind and body in any lawful calling. *Smith* v. *Texas*, 233 U.S. 630; *Meyer* v. *Nebraska*, 262 U.S. 390, 399.

Whatever those who have spoken of the "privilege"[10] to practice law may have had in mind, this Court firmly resolved the matter in *Schware* v. *Board of Bar Examiners*, *supra*:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Dent* v. *West Virginia*, 129 U.S. 114. Cf. *Slochower* v. *Board of Education*, 350 U.S. 551; *Wieman* v. *Updegraff*, 344 U.S. 183. And see *Ex parte Secombe*, 19 How. 9, 13. A State can require high standards of qualifications, such as good moral character or proficiency in its law, before it admits an applicant to the bar, *but any qualification must have a rational connection with the applicant's fitness or capacity to practice law*. *Douglas* v. *Noble*, 261 U.S. 165; *Cummings* v. *Missouri*, 4 Wall. 277, 319-320. Cf. *Nebbia* v. *New York*, 291 U.S. 502." 353 U.S. at 238-239. (Emphasis added).
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> "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless

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10. Admittedly, the right to practice law is not one of the "privileges" secured by the Privileges and Immunities Clause of the Fourteenth Amendment. This clause is narrowly limited to rights which an individual enjoys solely by virtue of his United States citizenship and does not include immunities one enjoys simply as a person. *Slaughter-House Cases*, 16 Wall. 36. Cases such as *Ex parte Lockwood*, 154 U.S. 116 and *Bradwell* v. *The State*, 16 Wall. 130, holding that the right to practice law is not a privilege or immunity of a citizen of the United States, have no significance as to the application of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Some of the courts which have spoken of the lawyer's "privilege" to practice law may have mistakenly supposed that *Lockwood* and *Bradwell* did interpret these latter clauses.

> of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that *a person cannot be prevented from practicing except for valid reasons.* Certainly the practice of law is not a matter of the State's grace. *Ex parte Garland*, 4 Wall. 333, 379." 353 U.S. at 239, footnote 5 (Emphasis added).

In *Schware* this Court dealt with state denial of admission to practice; the applicant had been rejected because of failure to establish "good moral character." Here the problem is one of state exclusion from practice after admission. The applicable constitutional principles are the same. It is inconceivable that the Fourteenth Amendment is concerned with admission to practice but is indifferent to the fate of the attorney afterward. If unreasonableness and arbitrariness are forbidden at the threshold of a legal career, as in *Schware*, when the burden of proof is on the applicant seeking admission, unreasonableness and arbitrariness are surely forbidden when the state has the burden and seeks to deprive a longstanding member of its Bar of the right fully to engage in practice. *Cohen* v. *Hurley*, 366 U.S. 117.

Many years ago, when the 1865 Congress sought to exclude Southern adherents from practice before federal courts, this Court said in *Ex parte Garland*, 4 Wall. 333, 379:

> "The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of

which he can only be deprived by the judgment of the court, for moral or professional delinquency."[11]

Thus in point of fact, *Schware* introduced no new legal principle.[12] *Schware* simply reiterated as to lawyers the principle which is implicit in the Fourteenth Amendment as to all persons, namely, that the state may not act arbitrarily, or, stated positively, that the means selected by the state and its agencies must have rational connection with an end the state is empowered to achieve under its police power. *Weaver* v. *Palmer Brothers Co.*, 270 U.S. 402.

It is submitted that amended Rules 41 and 54 lack such necessary reasonable basis as applied to appellant Martin. The Kansas Supreme Court has wholly failed to sustain the burden of establishing a rational connection between the revocation of appellant's right freely to represent clients

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11. It is this statement in *Ex parte Garland* to which Mr. Justice Black was no doubt referring when he cited the case in footnote 5 of the *Schware* opinion. See p. 23, *supra*, 353 U.S. at 239.

12. Prior to *Schware* a number of state and federal cases expressed the belief that the lawyer has a constitutionally protected interest in his practice. See *In re Fite*, 228 Ala. 4, 152 So. 246, 248 ("It need not be observed, that one having been duly admitted to his profession has a substantial interest and right therein, within the law, to enjoy its emoluments in its contribution to his livelihood, until he voluntarily forfeits or relinquishes that right, by the withdrawal of that permission according to the due process of law, or by physical hindrance."); *In re O'Bein's Petition*, 79 Conn. 46, 63 Atl. 777, 780 ("To disbar an attorney is to deprive him of what, within the meaning of our constitutions of government, may fairly be regarded as property."); *People* v. *Love*, 298 Ill. 304, 131 N.E. 809, 811 ("The right to follow either one of these professions [medicine, law and surgery] is one of the fundamental rights of citizenship."); *In re Applications for Admission to Practice*, 14 S.D. 429, 85 N.W. 992, 993. "It [the practice of law] was a vested right, of which he could not be deprived by an act of the legislature, and one of which he could be deprived only upon good cause shown, and after proper judicial proceedings."); *Keeley* v. *Evans*, 271 Fed. 520, 522 (D.C. Ore.) ("Without doubt, the right of an attorney to practice law is a property right, which can be taken from him only after judicial hearing and a fair opportunity to be heard in his own defense.")

in Kansas courts and any objective the court might legitimately attain in the exercise of its power to maintain the standards of the bar.

C. The Kansas Court's Rules Are Arbitrary and Unreasonable.

A rule like Rule 54 as applied to *foreign* lawyers, that is, lawyers *without residence or office* in Kansas,[13] has several conceivable justifications. One justification might be found in the assurance that local counsel will be available for the service of notice, whereas the foreign attorney without residence or office in the state might not be so available.[14] Another is that a foreign lawyer who has not regularly been admitted to practice in the state will perhaps be unacquainted with the law of the state and thus unable to represent his client's interests properly.[15]

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13. According to the summary of court rules and statutes in the American Bar Foundation Research Memorandum Series No. 1 entitled *Admission of Non Resident Attorneys Pro Hac Vice in State Courts and the District of Columbia*, about half of the states have some provision for the association of foreign attorneys with local counsel. It is generally clear from the wording of the court rules or statutes that it is non-resident attorneys or attorneys without office in the state, not regularly admitted to practice in the state, who are required to join with local counsel. In several states, however, there are rules or statutes with phraseology similar to amended Rule 54, which could literally be applied as the Kansas Supreme Court has applied its rules. *E.g.* Neb. Rev. Stat., sec. 7-103 (has reciprocity clause); Okla. Stat., Title 5, secs. 17.1 and 17.2 (Supp. 1959) (has reciprocity clause); Code of Va., sec. 54-42 (1950); Wash., Rule 7, Rules for Admission to Practice; Wyo. Stat., 1957, 33-49, and Rule 19, Vol. 2, p. 27. None of these statutes or rules appears to have been applied as amended Rule 54 has been.

14. In *Arshaud* v. *Griffin*, 202 Iowa 462, 210 N.W. 540, the court upheld an Iowa law which required a non-resident Missouri attorney to designate a local lawyer as agent to receive notices. But see *Letaw* v. *Smith*, 223 Ark. 638, 268 S.W.2d 3, where it was held that the rule of an Arkansas county chancery court precluding the prosecution of a suit therein by a non-resident attorney who had been admitted to practice in Arkansas, without association with an attorney residing in the county, was invalid as unreasonable. The rule was also in disharmony with the Arkansas reciprocity statute.

15. *Felton* v. *Rubow*, 163 Kan. 82, 179 P.2d 935.

The Kansas Supreme Court seeks to circumvent the obvious absence of any such relevancy of amended Rules 41 and 54 to appellant through the medium of extravagant judicial notice of facts—facts pertaining to hypothetical evils wholly without reference to him. The Kansas court evidently found these facts while in conference on the case for it did not previously note them in *Taylor* v. *Taylor*, 185 Kan. 324, 242 P.2d 190 (*supra*, pp. 5-6), when Rules 41 and 54 were under identical attack, nor were any such facts urged in the proceeding below by appellee or by the bar associations.

The Kansas court meticulously avoids ascribing to appellant any of the faults or inadequacies which are supposed to justify amended Rules 41 and 54. His competency, conscientiousness and integrity are admitted. He is given the apology that "in carrying out its duty of supervising the actions of its officers, the supreme court cannot always formulate rules without the possibility, regrettably, that some of them may work a hardship on some member or group of members of the bar." (R. 29). Of course a state or its agency may lay down *reasonable* rules, and the scale of judgment as to their reasonableness is not too precise. *Otis* v. *Parker*, 187 U.S. 606; *Armour & Co.* v. *North Dakota*, 240 U.S. 510. When a rule has been found to be reasonable, the only remaining problem is the separation of those who fall under the rule from those who fall without; individual hardships do not count for much. *Samuels* v. *McCurdy*, 267 U.S. 188. Unfortunately, the Kansas court glosses over the inapplicability of these propositions to the matter at hand. Its amended Rules 41 and 54 are not reasonable, however insensitive the scale on which they are weighed. Furthermore, a person can not reasonably be brought within the ambit of any rule, whether reasonable or unreasonable *per se*, if his conduct is totally devoid of bear-

ing upon the evils which the rule is designed or supposed to dissipate.

1. The Kansas court is endeavoring to set up interstate economic barriers.

The Kansas court takes judicial notice that approximately 6/7 of the 2,100 practicing attorneys in the Kansas City metropolitan area are officed on the Missouri side of the state line (R. 27). The court then describes in some detail the great industrial areas in Wyandotte and Johnson County, Kansas, leaving the inference that the main litigation is in those counties and not in Missouri. It seems indeed strange that 1,800 of the 2,100 practicing attorneys should be in Missouri where there supposedly is little of this industrial business, leaving Kansas without adequate counsel, especially since under the implications of Rules 41 and 54 these Missouri lawyers are getting the Kansas business and the court feels litigants should hire local Kansas lawyers.[16]

The total lack of relevancy between a lawyer's competency to appear in court and the distribution of lawyers in relation to the quantity of litigation serves to emphasize the fact that the Kansas court is primarily concerned in its amended Rules with the erection of barriers for the eco-

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16. Although the Kansas Court's analysis of the economic situation seems decidedly distorted, it does point up that persons in the metropolitan area commonly live in one state but work or have business connections in the other. Many of such persons desire to have one attorney to represent them in both states. It has been customary since the Kansas legislature abolished the reciprocity rule in 1939 (see footnote 6, *supra*) for lawyers to seek admission in both Kansas and Missouri in order to be able to serve their clients better. Now, amended Rules 41 and 54 force many of these clients to an unhappy alternative. They must either give up their right to counsel of their own choice and employ for their Kansas litigation someone who qualifies as "local counsel" or they must employ additional counsel whom they do not want or need.

nomic protection of Kansas lawyers engaged in one-state practice.[17] Yet, the United States is more than a collection of states; it is a unified nation to the formation of which this Court has greatly contributed. Freedom of movement and the right of the individual to conduct affairs in several states has been zealously guarded. *Allgeyer* v. *Louisiana*, 165 U.S. 578; *Edwards* v. *California*, 314 U.S. 160. In the latter decision the Court significantly remarked:

> "It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting gates to the outside world. But, in the words of Mr. Justice Cardozo: 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.' Baldwin v. Seelig, 294 U.S. 511, 523." 314 U.S. at 173.

2. The Kansas court ignores its own rules for service of process.

The Kansas court purports to take judicial notice that Kansas courts have experienced difficulty in getting service of papers and motions on Kansas licensed attorneys officed in Missouri and in securing the presence of Kansas licensed attorneys officed in Missouri (R. 28). It is strange that no allusion was made to any such difficulties in the trial court (R. 11) or in *Taylor* v. *Taylor* (*supra*, pp. 5-6); stranger yet that the court's rules for the serv-

17. In this regard, it is interesting to note that four bar associations filed *amicus* briefs in the court below (R. 19). *Cf.* Mr. Justice Black's comment in *Cohen* v. *Hurley*: "The true nature of the underlying controversy in this case, as a controversy between economically competing groups, lawyers, is shown by the fact that four different associations of lawyers filed briefs *amicus curiae* in the present proceeding * * *." 366 U.S. at 148, fn. 37 (dissenting opinion).

ice of notice[18] works satisfactorily in respect to Kansas lawyers with home and office located at points in Kansas remote from the Wyandotte and Johnson County courts, but works unsatisfactorily in respect to Kansas lawyers with home and office in Wyandotte or Johnson County who also happen to have an office in nearby Kansas City, Missouri; and also strange that telephone communication is available as to one group of lawyers but not as to another. It is wondrous that Missouri-officed Kansas lawyers as a class are more remiss than their Kansas-officed brethren in appearance in court and that this remissness can be attributed to the few extra minutes driving time by which their Missouri offices are farther from Kansas courthouses than some Kansas offices.[19] Indeed, it is little short of phenomenal that having a law office in Missouri is the cause of so much difficulty, especially when the Kansas lawyer can maintain a real estate business, drive a taxi or raise chickens in Missouri presumably without being derelict to Kansas.

The Kansas court's hypothetical grounds are premised on a confusion of the "foreign attorney" without residence or office in Kansas, falling within G.S. 1949, 7-104, *supra*, pp. 3-4, and the Kansas attorney regularly practicing in Kansas with residence and office there who is affected by

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18. G.S. 1949, 60-3827, Rule 44 of the Kansas Supreme Court, governing practice in district courts, provides:

> "Counsel filing a motion or demurrer or pleading subsequent to the petition shall, on the day the same is filed, deliver or mail a copy thereof to counsel of record for all adverse parties."

And see to similar effect Kan. G.S. 1949, 60-722, 60-723, 60-3306, see also *Von Der Heiden v. Williams Estate*, 162 Kan. 233, 175 P.2d 117 (requirement of 60-3306 that notice of appeal "must be personally served," met by registered mail service)

19. Expressways link downtown Kansas City, Missouri, with Olathe, Kansas, the county seat of Johnson County, and with Kansas City, Kansas, the county seat of Wyandotte County. Convenient highways and streets bind all these communities together.

amended Rules 41 and 54 because he also practices in Missouri. It is somewhat ironical that neither G.S. 1949, 7-104, nor amended Rules 41 and 54, nor any other Kansas statute or rule requires that a Kansas lawyer have either his office or his residence in the state.[20] Therefore, a lawyer conceivably could confine his practice to Kansas and yet not be housed nor officed there. He would suffer a slight disability in not being able to function as "local counsel,"[21] but that is all.[22]

Appellant Martin has both home and office in Kansas to which process can be mailed or served under the Kansas court's rules.[23] Until the amendment of Rules 41 and 54, he could serve as "local counsel."[24] It is admitted that he has never failed to receive process and that no difficulty has been experienced in securing his presence in court. To require him to employ co-counsel (whose actual availability for service of process is in fact immaterial, it being demanded only that he does not practice regularly in Missouri) is manifestly unnecessary and unreasonable. To be sure, appellant may not always be

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20. An applicant to take the bar examination must be a resident of Kansas or a graduate of a Kansas law school (Rule V, Kansas State Board of Law Examiners, 186 Kan. xx).

21. G.S. 1949, 7-104, provides that "said associate attorney shall be a resident of and maintain his law office within the judicial district in which said action is filed or pending." See *supra*, p. 3.

22. Because no statute or rule requires a Kansas licensed lawyer to be a resident of Kansas, it would seem that if a Kansas lawyer had neither an office nor residence in Kansas, the Kansas Supreme Court could make a reasonable rule for service of process, such as service upon the clerk of the court or upon a designated agent, or by mail as provided in Missouri Supreme Court Rule 3.03 b.

23. See footnote 18, *supra*.

24. *Lindbloom* v. *Lindbloom*, 177 Kan. 286, 279 P.2d 243; *Rhea* v. *Kansas City Power & Light Co.*, 176 Kan. 674, 272 P.2d 741.

in his Kansas office, but it can hardly be expected of a lawyer that in order to remain in good standing at the bar he confine himself day and night to his office. If amended Rules 41 and 54 can be applied to a resident Kansas attorney because he is absent from the state for periods of time to care for his Missouri practice, then a similar restriction can be applied to any Kansas lawyer who absents himself from the state for any reason whatever. Viewed from this logical extreme it may become risky for a Kansas lawyer to do otherwise than confine himself to perpetual seclusion in Kansas. The mere possibility that some day appellant might be unavailable is no justification for barring him from the Kansas courts unless he appears with local counsel. *Adams* v. *Tanner*, 244 U.S. 590.

3. The Kansas court erroneously believes that specialization follows state lines and not subject matter.

The Kansas court further seeks to justify amended Rules 41 and 54 upon "the consideration that in the past decade or so the manner in which law is practiced has tended to swing with emphasis to the specialist." * * * "Litigation invokes statutory laws, rules of courts, and peculiarities of local practice requiring special knowledge and opinions. Such matters are best handled by a local attorney who constantly deals with problems arising in a variety of situations. Trial work requires immediate decisions—there is little time for reflections and research. Only the lawyer with considerable experience in a particular forum can adequately and consistently render high-level service in the area of local procedure." (R. 31.)

Kansas does not have a class of barristers whose functions are clearly delineated from those of solicitors. An "office attorney" with no trial experience whatsoever is

perfectly free to try any case in any Kansas court. Thus Kansas lawyers may practice before any Kansas court, whether they are familiar with local peculiarities or not, and they are not required to be joined by "local counsel." The Kansas Supreme Court appears to think that specialization depends upon state lines rather than on subject matter; *sub silentio* it assumes that the Kansas-Missouri lawyer who specializes, shall we say, in personal injury litigation knows less about the Kansas Workmen's Compensation Law and practice before the Kansas Workmen's Compensation Commission than does a lawyer practicing exclusively in Kansas who deals solely with tax matters or real estate or probate practice. The absurdity of this assumption destroys the reasonableness of the amended Rules.

The Kansas court tries to give the impression that it is striking at those who have virtually no practice in Kansas, that is, "foreign attorneys" under G.S. 7-104. Yet Rules 41 and 54 are not applicable solely to "foreign attorneys," but also to Kansas-domiciled lawyers regularly practicing in Kansas. The latter have had experience in Kansas trial procedure and most are competent trial lawyers, as appellant admittedly is,[25] and are far more able to represent

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25. Appellant was admitted to the Kansas Bar in 1948 after successfully taking the Kansas bar examination. Since his admission appellant has practiced law in the Kansas courts and has argued cases before the Kansas Supreme Court. He has been appointed by the State of Kansas to represent it in trial matters before the courts. He has been City Attorney for Mission, Kansas, since 1951. He has been a member of the Board of Tax Appeals of the State of Kansas (1958-1961). (R. 2-4.)

In the face of this evidence, for the Kansas court to conclude that he lacks necessary familiarity with Kansas law, or is in confusion concerning it, from the mere fact that he has contact with the law of Missouri, is far more irrational and untenable than the conclusion condemned by the unanimous Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232. Indeed, it would appear that appellant's knowledge of the laws of both states has been advantageous to Martin's clients. See *Goodrich* v. *Hammond*, 280 F.2d 501 (C.C.A. 10th Cir.)

clients in the Kansas courts than is an inexperienced Kansas office lawyer or a recent graduate, either of whom will eminently qualify as "local counsel" under Rules 41 and 54. Without the trouble of investigating realities, the Kansas Supreme Court has characterized a certain group of Kansas practitioners as incompetent to appear without assistance, as "non-specialists in Kansas procedure," simply because they also practice "regularly" in Missouri. It is patently ridiculous to say that if a man devotes some time to learning Missouri practice and procedure, he is thereby rendered incompetent in Kansas procedure. The same would be true regarding federal practice or the procedures before the myriad of administrative agencies not exclusively of Kansas origin or location. Does regular practice and appearance before the Supreme Court of the United States disqualify a lawyer from practice in the Kansas courts without joinder of local counsel?

4. The amended rules are vague and uncertain.

The Kansas court does not define what it means by "regularly engaged" in out-of-state practice. Apparently the court intends to embody flexibility and latitude in Rules 41 and 54 so that they may be applied whenever a Kansas court feels that a Kansas attorney has exceeded his proper quota of out-of-state practice. Economic vagaries and the whims of the courts are to determine whether one Missouri client or fifty makes a Kansas lawyer ignorant of Kansas law and procedure, and incompetent to appear in a Kansas court without association of local counsel. The concept of the rule of law is rooted in the constancy of norms which do not vary with the exigencies of particular cases, the influence or lack of influence of the parties, or the disposition of the judge. The rule of law is embedded in the Fourteenth Amendment. Vague, un-

certain standards, like the Rules of the Kansas court, which afford no guidance and give no adequate forewarning that certain conduct is forbidden, offend the due process clause. *Winters* v. *New York*, 333 U.S. 507; *Musser* v. *Utah*, 33 U.S. 95.

In sum, therefore, the Supreme Court of Kansas has failed to justify the imposition of its "local counsel" rule upon appellant Martin, a qualified member of its Bar who maintains an office, practices and resides in Kansas. Preventing appellant from engaging in Missouri practice certainly has no demonstrable relation to the better administration of justice in Kansas. And no rational relation exists between amended Rules 41 and 54 and the qualifications which Kansas imposed upon appellant at the time of his admission to the Bar. *Schware* v. *Board of Bar Examiners, supra; Ex parte Garland, supra.* Whatever may be the power of the Kansas court to attach a condition to the license of an attorney admitted after December 15, 1958, when the Rules were amended, the court cannot deprive a previously admitted, long-standing and qualified attorney of the fruit of years of preparation and practice. As amended and applied to appellant by the Supreme Court of Kansas, Rules 41 and 54 are unreasonable and arbitrary, and deprive appellant of due process of law.

II. Equal Protection.

Amended Rules 41 and 54 also deprive appellant of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause voids specious or fanciful classifications which cause some persons to be treated differently from others when they are actually similarly situated; the classification must bear a substantial relation to a legitimate objective of the State. *Morey* v. *Doud*, 354 U.S. 457;

Skinner v. *State of Oklahoma*, 316 U.S. 535; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389. As stated by the Court in *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527:

> "The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415; *Louisville Gas & E. Co.* v. *Coleman*, 277 U.S. 32, 37; *Air-Way Electric Appliance Corp.* v. *Day*, 266 U.S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 160."

The classification resulting from the application of Rules 41 and 54 to attorneys such as appellant lacks any "rational basis" and is "palpably arbitrary." Appellant Martin and other Kansas attorneys similarly engaged in out-of-state practice by the imposition upon them of Rules 41 and 54 are placed in the category of "foreign attorneys" with all the disabilities attaching thereto. Although they may practice outside the State, they do not differ demonstrably as to legal knowledge, availability, capacity or moral qualities from Kansas attorneys with practices limited to Kansas who are not subjected to the onerous restrictions of Rules 41 and 54. A licensed Kansas attorney demonstrates no absence of qualities necessary for the practice of law in Kansas and offends against no constitutionally valid policy of Kansas merely by virtue of additional practice in another State; this has been shown above in respect to the matter of denial of due process. By parity of reason the fact that a Kansas attorney also practices outside the state is an insubstantial, speculative and remote basis of discrimination, and a classification resting thereon does not "rest upon some ground of differ-

ence having a fair and substantial relation to the object of the legislation." *Allied Stores of Ohio* v. *Bowers, supra.* The Fourteenth Amendment guarantees not only equal protection of the laws but also the protection of equal laws. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 350.

CONCLUSION.

For the reasons stated, the judgment of the court below should be reversed; Kan. G.S. 1949, 7-104, and amended Rules 41 and 54 of the Kansas Supreme Court should be declared to be in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment as applied to appellant; and the court below should be directed to make permanent the writ of mandamus allowing appellant to appear in appellee's court without local counsel.

Respectfully submitted,

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